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No. 632

In the Supreme Court of the United States

VERNON R. MORGAN and
ROBERT C. YOUNG,

Appellants

vs.

BOARD OF FORESTRY OF
THE STATE OF OREGON,
and POLK COUNTY, a municipal corporation,

Appellees

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

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VERNON R. MORGAN and
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BOARD OF FORESTRY OF
THE STATE OF OREGON,
and POLK COUNTY, a
municipal corporation, Appellees

ON APPEAL FROM THE SUPREME COURT
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JURISDICTIONAL STATEMENT

This is an appeal from a decree of the Supreme Court of the State of Oregon entered July 16, 1968, quieting the appellees' title to real property. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial federal question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Oregon is reported at 86 Oregon Advance Sheets 1053, 443 P.2d 236 (1968). The opinion of the Circuit Court of the State of Oregon for Polk County is not reported.

The findings and decree of the Circuit Court are attached hereto as Appendix A. The opinion of the Oregon Supreme Court is attached hereto as Appendix B. Attached hereto as Appendix C is the order of the Oregon Supreme Court which is being appealed from.

JURISDICTION

This was a suit to declare void a tax foreclosure proceeding, to remove the cloud of the proceeding from appellants' title and to quiet that title. The appellants asserted that the tax foreclosure was void because the notice given did not meet the minimum standards required by the due process clause of section 1 of the Fourteenth Amendment to the United States Constitution. The Circuit Court held that appellants were barred from attacking the foreclosure proceeding by section 312.230(1), (3) of the Oregon Revised Statutes.

The appellants appealed to the Oregon Supreme Court asserting that those sections were unconstitutional as being in violation of the due process clause of the United States Constitution. On June 26, 1968, the Oregon Supreme Court entered its decree and held the statute did not violate the United States Constitution. On July 16, 1968, the Oregon Supreme Court entered an order denying a rehearing.

The notice of appeal was filed September 27, 1968.

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the decree on appeal in this case:

Schroeder v. City of New York, 371 U.S. 208, 83 Sup. Ct. 278 (1962)

Standard Oil Co. of California v. Johnson, 316 U.S. 481, 62 Sup. Ct. 1168 (1942)

STATUTES AND CONSTITUTION

This case involves the validity of sections 312.230 (1), (3) of the Oregon Revised Statutes which provide:

"(1) Every action, suit or proceeding, commenced for the purpose of determining the validity of a sale of real property on foreclosure for delinquent taxes, or to quiet title against such sale, or to remove the cloud thereof, or to recover possession of the property, shall be commenced within two years from the date of the judgment and decree of foreclosure and sale to the county, or within six months from June 1, 1961, whichever is the later.

" * * * * *

"(3) For all purposes this section shall be construed as a statute of prescription as well as a statute of limitation."

These sections are found in Volume 2 at page 1100 of the Oregon Revised Statutes.

Also involved is the due process clause of section 1 of the Fourteenth Amendment to the United States Constitution which provides:

" * * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *." U.S.C.A., Const., Amend. 14, "Due Process" p. 4

QUESTIONS PRESENTED

1. Is a statute of limitations unconstitutional if it

is held to bar an attack on a decree which is void because it is based upon notice which did not meet the minimum standards required by the due process clause?

2. In a foreclosure proceeding does a published notice which contains an erroneous description satisfy the requirements of due process if no other notice is given?

STATEMENT OF THE CASE

I. FACTS

In 1941 Polk County commenced a suit to foreclose delinquent taxes. It sought to foreclose the interest of Ralph E. Williams in the following property:

> S ½ of the NW ¼ and N ½ of the SW ¼, Sec. 29, Twp. 9S, R. 8W of Willamette Meridian, Polk County, Oregon.

The only notice given was by publication. It described the property as:

> "S ½ of the *NW ½* and the N ½ of the SW ¼ of Section 29, T.9S., R.8W., W.M., in Polk County, Oregon." (Emphasis added.)

The county acquired a sheriff's deed to the property and in 1964 it conveyed the property to the Board of Forestry, the appellee here. The appellants through a series of conveyances have acquired the interest of Ralph E. Williams.

II. HOW FEDERAL QUESTION PRESENTED

The complaint filed in this case alleged that the erroneous, published summons violated due process and that for that reason all subsequent proceedings were void. It alleged:

"* * * said Decree, Order of Sale, Sheriff's Deed, and all proceedings were and are void, a nullity, and without due process of law * * *."

Appellants first attacked the constitutionality of the statute of limitations, section 312.230 of the Oregon Revised Statutes, in its brief on appeal. This issue was not raised in the Circuit Court because the Oregon Supreme Court had held in *Evergreen Timber Co. v. Clackamas County*, 235 Or. 552, 385 P.2d 1009 (1963), that that section did not apply to proceedings in which the published notice contained errors such as those in the instant case. That case remained the law in the State of Oregon until the instant case was decided. The trial court held, however, that the statute of limitations was a bar to the attack on the foreclosure (App. A).

The appellants' brief in the Oregon Supreme Court asserted that the erroneous published notice violated due process and the statute of limitations did also if it was applied to the appellants.

Reading the instant decision together with that in *Hood River County v. Dabney*, 246 Or. 14, 423 P.2d 954 (1967), upon which the instant decision rests, demonstrates that the Oregon Supreme Court decided the constitutional questions. In the *Hood River County* case the court declared:

"Although we could rest our decision solely upon the ground that the defect in the summons was nonjurisdictional and that, therefore the foreclosure decree is free from collateral attack, in the interest of carrying out the clearly indicated legislative purpose to give the 'utmost stability' to tax titles we prefer to rest our decision upon the broader ground that even if the defect in the proceedings

is jurisdictional for failure to meet either legislative or constitutional requirement deemed essential to jurisdiction, it was within the purpose and power of the legislature in enacting ORS 312.220 and ORS 312.230 to bar the delinquent owner from attacking the foreclosure decree."

In the instant case the court declared:

"Assuming, without deciding, that the error in the description in the published notice constituted a jurisdictional defect and rendered the tax foreclosure proceeding void as to Williams, plaintiffs are barred from recovery for the reasons stated in Hood River County v. Dabney, 84 Or Adv Sh 179, 246 Or. 14, 423 P 2d 954 (1967)."

Again, in the petition for rehearing appellants attacked the constitutionality of the statute of limitations and of the foreclosure proceedings based upon the erroneous published notice. The petition for rehearing was denied without comment.

THE FEDERAL QUESTION IS SUBSTANTIAL

This appeal presents the important issue of whether a statute of limitations may be used to avoid or "cure" a violation of due process resulting from the failure to give a party notice of a judicial proceeding. A number of states have statutes similar to the statute of limitations which the appellants attack here. One such provision was considered by this court in *Covey v. Town of Somers,* 351 U.S. 141, 76 Sup. Ct. 724 (1956). However, the court did not find it necessary to pass on its validity.

The precise question presented here has never been decided by the United States Supreme Court. It has decided a number of cases in which the principles

controlling this case have been enunciated. The Oregon Supreme Court has ignored, and in fact repudiated those principles in the instant case.

No proceeding can be accorded finality in the absence of notice reasonably calculated to notify interested parties of the action against them.

In *Schroeder v. City of New York*, 371 U.S. 208, 83 Sup. Ct. 278 (1962), the court held that a property owner who had not received adequate notice of condemnation proceedings could attack the proceedings even though the time had expired in which to file a claim for compensation under the state law.

In *Walker v. City of Hutchinson*, 352 U.S. 112, 77 Sup. Ct. 200 (1956), the court reached the same result. There it allowed an attack on a condemnation proceeding by a landowner. Because he had not received adequate notice the court held that he was not limited to the time permitted by the state statute in which to attack the proceeding.

The Oregon Supreme Court also violated the rule announced by this court in *Armstrong v. Manzo*, 380 U.S. 545, 85 Sup. Ct. 1187 (1965). There the court held that a party deprived of the notice required by the due process clause must be restored to the position he would have occupied had due process been accorded him in the first place. The Oregon courts have not restored appellants to the position they would have occupied had due process been accorded them. The Oregon courts have held that the statute of limitations bars them from any redress for the violation of their constitutional rights.

The Oregon Supreme Court did not decide whether the erroneous published notice violated due process.

It apparently assumed that it did and, if so, it was right.

To meet the requirements of due process, notice must be reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action. Notice by publication is at best a poor method of warning those whose interests may be adversely affected by litigation. When it is used the warning should not be muffled by ambiguity.

In *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 70 Sup. Ct. 652 (1950), this court prescribed the constitutional requirements for notice. The court declared:

> "The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is reasonably certain to inform those affected [citations omitted] or where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes." 339 U.S. at 315, 70 Sup. Ct. at 657.

In *Walker v. City of Hutchinson*, 352 U.S. 112, 77 Sup. Ct. 200 (1956) and *Schroeder v. City of New York*, 371 U.S. 208, 83 Sup. Ct. 278 (1962), the court observed that newspaper publication rarely informs the landowner of proceedings against his property. In the instant case the notice suffered all the inherent limitations of notice by publication. In addition it incorrectly described the property in jeopardy. It is submitted that due process requires more.

In the instant case as in the *Schroeder* case the state courts have upheld the state statute against a

claim that it is unconstitutional. The court in *Standard Oil Co. of Calif. v. Johnson*, 316 U.S. 481, 62 Sup. Ct. 1168 (1942), dealt with a contention that a statute, if construed as the appellees urged it should be, would violate the constitution. The court held that since the validity of the state statute as construed was drawn in question it had jurisdiction of the appeal. In the instant case the appellants urged in the Oregon Supreme Court that the challenged statute of limitations, if applied to this case, was unconstitutional.

CONCLUSION

It is submitted that the decision of the Oregon Supreme Court fails to recognize the principles of due process. It permits a party's right to notice to be violated and then prohibits him from seeking redress when he discovers that fact. We believe the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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Appendix A

DECREE

which omitting recitals, follows in material part:

The court having previously decided that the issues of laches, waiver, estoppel, tender and champerty, affirmative defenses of the defendant Board of Forestry of the State of Oregon, were not sustained by the testimony or the law, and such defenses are resolved in favor of plaintiffs; and

The court finds that plaintiffs made a proper tender of delinquent taxes herein and they are not barred by laches, waiver, estoppel or champerty in this proceeding; and

The court having taken under advisement during the course of trial the motion of defendant Board of Forestry of the State of Oregon to dismiss plaintiffs' complaint, finds that said motion should be denied; and

The court having considered the testimony, exhibits, memorandum and closing arguments of the parties, finds that defendants have failed to sustain their defense of adverse possession on the ground that there was a failure to show ouster or notice thereof; and

The court further finds that the title of defendant Board of Forestry of the State of Oregon, acquired through the Polk County foreclosure proceeding No. 9562, is free from attack by operation of ORS 312.230 and that the validity of the tax foreclosure is resolved in favor of the defendant Board of Forestry of the State of Oregon and that by virtue of the short term statute of limitations heretofore cited, due process has

been complied with and that the foreclosure decree, under the facts in this case, could not be attacked; and

The court finds that plaintiffs' complaint should be dismissed and the foreclosure decree and the title of the defendant Board of Forestry of the State of Oregon upheld; and the court being fully advised,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that that certain judgment of foreclosure and order of sale in Polk County Suit No. 9562 be and the same hereby is declared a valid tax foreclosure and that the defendant Board of Forestry of the State of Oregon is the owner, in fee simple, free of any claim, right, title, cloud or interest of plaintiffs or their predecessors in interest, of the following described real property, to-wit:

The South ½ of the Northwest ¼ and the North ½ of the Southwest ¼ of Section 29, Township 9 South, Range 8 West, Willamette Meridian, in Polk County, Oregon.

Appendix B

O'CONNELL, J.

This is a suit to declare void a tax foreclosure proceeding. Defendant, State Board of Forestry, seeks a decree quieting title to the property. Plaintiffs appeal from a decree upholding the foreclosure decree and quieting title in the defendant. Defendant cross-appeals from that portion of the decree rejecting its claim of adverse possession.

In December, 1941, Polk County instituted tax foreclosure proceedings on various parcels of property including an undivided one quarter interest of Ralph E. Williams, plaintiffs' predecessor in title. A summons was published on December 11, 1941, naming R. E. Williams as a party defendant and directing him to appear within a specified time. Early in 1942, prior to the completion of the foreclosure proceeding, the Board of Forestry acquired from Polk County a deed to an undivided three quarter interest in the disputed property, making the Board a tenant in common with Williams who held a one quarter interest in the same parcel.

Ralph E. Williams made no appearance and a decree of foreclosure was entered against the property on January 24, 1942. The following year, the sheriff sold the Williams' interest to Polk County and the deed was recorded on April 3, 1943. In 1964 Polk County deeded the interest to the Board of Forestry.

Plaintiffs contend that the decree of foreclosure was void because the summons published by Polk County failed to accurately describe the property. The correct description of the property is:

S ½ of the NW ¼ and the N ½ of the SW ¼ of Section 29, T. 9 S., R. 8 W. of Willamette Meridian in Polk County, Oregon.

In the published summons, the property was described as:

"S ½ of the *NW ½* and the N ½ of the SW ¼ of Section 29, T. 9 S., R. 8 W.W.M., in Polk County, Oregon." (Emphasis added.)

Plaintiffs also claim that the method of giving notice of the foreclosure suit by newspaper publication was not a method reasonably calculated under the circumstances to apprise the parties of the proceeding and therefore did not meet the requirement of due process.

Defendant, Board of Forestry, answered arguing that plaintiffs' claim was barred by laches and estoppel and by the running of the statute of limitations provided for in ORS 312.230.[1] The defendant claims good title through the tax foreclosure suit and also by reason of adverse possession under ORS 12.050.

The trial court found that the defendant's defenses of laches, estoppel, and adverse possession were not sustained by the evidence. However, the court further found that the foreclosure proceeding was free from attack by virtue of the statute of limitations contained in ORS 312.230.

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[1]ORS 312.230 provides as follows:

"(1) Every action, suit or proceeding, commenced for the purpose of determining the validity of a sale of real property on foreclosure for delinquent taxes, or to quiet title against such sale, or to remove the cloud thereof, or to recover possession of the property, shall be commenced within two years from the date of the judgment and decree of foreclosure and sale to the county, or within six months from June 1, 1961, whichever is the later.

"* * * * *

"(3) For all purposes this section shall be construed as a statute of prescription as well as a statute of limitation."

Assuming, without deciding, that the error in the description in the published notice constituted a jurisdictional defect and rendered the tax foreclosure proceeding void as to Williams, plaintiffs are barred from recovery for the reasons stated in *Hood River County v. Dabney*, 84 Or Adv Sh 179, 246 Or 14, 423 P 2d 954 (1967).[2]

The decree of the trial court is affirmed.

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[2]See also Deardorff v. Hood River County, 84 Or Adv Sh 175, 246 Or 7, 423 P2d 952 (1967); Evergreen Timber v. Hood River Co., 84 Or Adv Sh 205, 246 Or 11, 423 P2d 963 (1967); Johnson v. State of Oregon, 245 Or 618, 621, 423 P2d 964 (1967).

Appendix C

BE IT REMEMBERED that at a regular term of the SUPREME COURT of the State of Oregon begun and held at the courtroom in the city of Salem on the first Monday, the 4th day of March, 1968, WHEREUPON on this Wednesday, the 26th day of June, 1968, the same being the 51st judicial day of said term, when the following proceedings were had:

VERNON R. MORGAN and ROBERT C. YOUNG, *Appellants and Cross-Respondents* v. BOARD OF FORESTRY of the State of Oregon, *Respondent and Cross-Appellant* and Polk County, a municipal corporation, *Defendant*	Appeal from POLK County

This cause on May 10, 1968, having been duly argued and submitted upon and concerning all questions arising upon the record and then reserved for further consideration, and the court having fully considered all said questions as well as suggestions of counsel in their argument and briefs finds there is not error as alleged.

IT THEREFORE IS CONSIDERED ORDERED and DECREED that the decree of the court below rendered and entered in this cause be and the same hereby is in all things affirmed.

Appellants having given an undertaking on appeal with St. Paul Fire and Marine Insurance Company as

surety conditioned that appellants will pay all damages, costs and disbursements which may be awarded against them on the appeal,

IT IS THEREFORE ORDERED that respondent have and recover of and from appellants and their surety its costs and disbursements in this court taxed at $40.00.

IT FURTHER IS ORDERED that this cause be remanded to the court below from which the appeal was taken with directions to enter a decree in accordance herewith.